

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2047,2127

To be argued by
ROBERT GOLD

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 74-2047 and 74-2127

UNITED STATES OF AMERICA,

Appellee,

—v.—

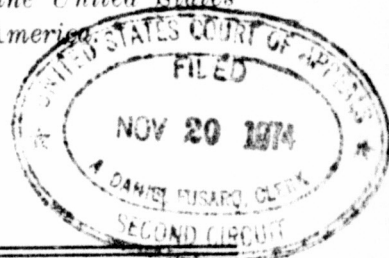
RICHARD HUSS and JEFFREY SMILOW,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ROBERT GOLD,
JOHN D. GORDAN, III,
*Assistant United States Attorneys,
Of Counsel.*



2

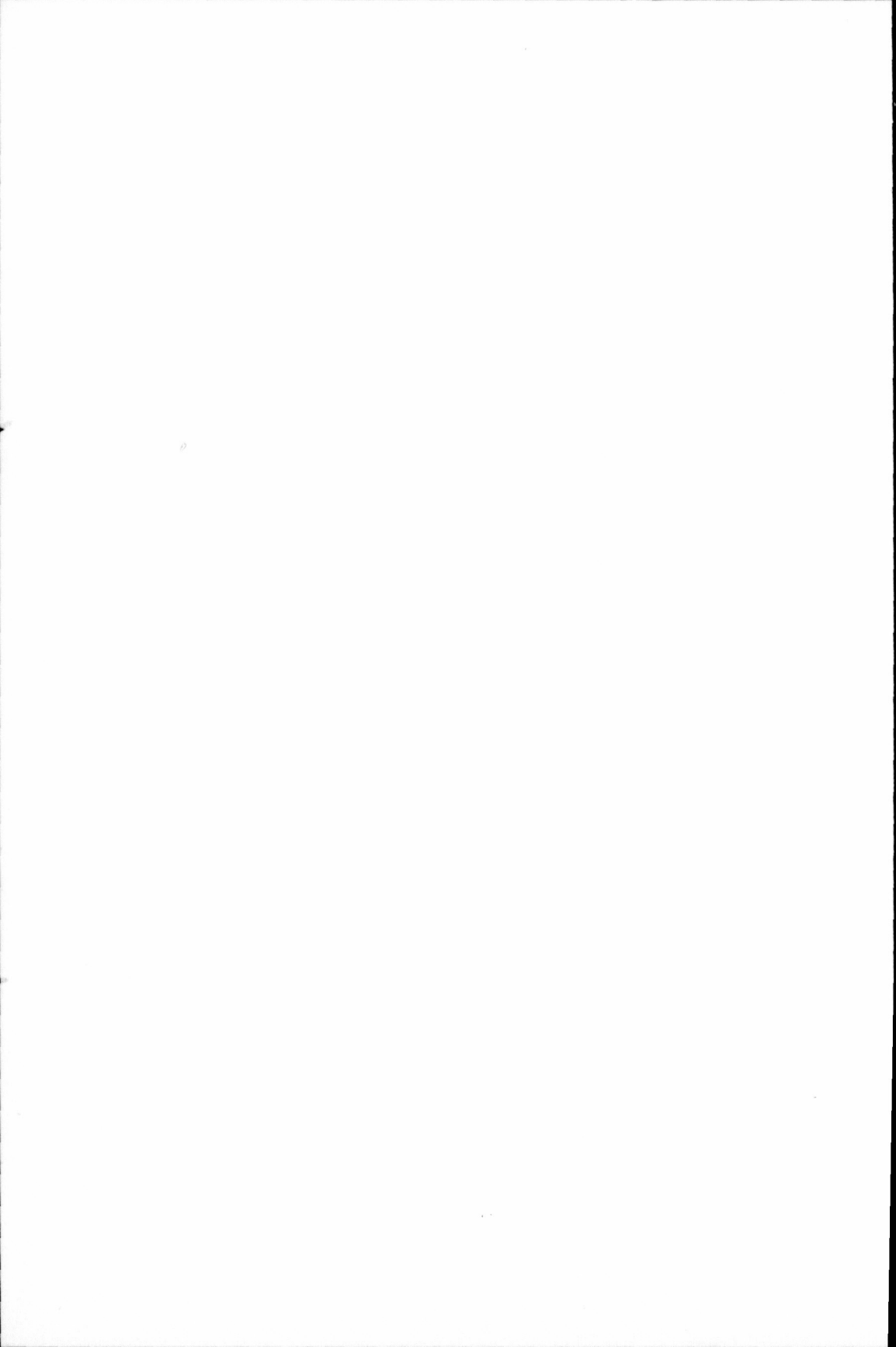


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Government's Case	2
B. The Defense Case	5
ARGUMENT:	
POINT I—Judge Griesa did not act improperly in precluding an attempt by Huss and Smilow to litigate a wiretap taint defense	6
POINT II—Judge Griesa properly excluded testimony proffered by the defendants concerning their religious beliefs and properly instructed the jury regarding such views	15
CONCLUSION	19

TABLE OF CASES

<i>Alderman v. United States</i> , 394 U.S. 165 (1969)	11, 12
<i>Backo v. Local 281, U.S. Brotherhood of Carpenters & Joiners of America</i> , 308 F. Supp. 172 (N.D.N.Y. 1969), <i>aff'd</i> , 438 F.2d 176 (2d Cir. 1970), <i>cert. denied</i> , 404 U.S. 858 (1971)	7
<i>Collazo v. United States</i> , 196 F.2d 573 (D.C. Cir. 1952), <i>cert. denied</i> , 343 U.S. 968 (1952)	17
<i>Gelbard v. United States</i> , 408 U.S. 41 (1972)	8
<i>Howat v. Kansas</i> , 258 U.S. 181 (1922)	7
<i>In re Dellinger</i> , 357 F. Supp. 949 (N.D. Ill. 1973), <i>aff'd</i> , 502 F.2d 813 (7th Cir. 1974)	15

<i>Leary v. United States</i> , 383 F.2d 851 (5th Cir. 1967), <i>rev'd on other grounds</i> , 395 U.S. 6 (1968)	17
<i>Leighton v. Paramount Pictures Corp.</i> , 340 F.2d 859 (2d Cir.), <i>cert. denied</i> , 381 U.S. 925 (1965)	7
<i>Smilow v. United States</i> , 465 F.2d 802 (2d Cir. 1972), <i>vacated and remanded on other grounds</i> , 409 U.S. 944 (1972), <i>on remand</i> , 472 F.2d 1193 (2d Cir. 1973)	4, 9, 16, 17, 18
<i>United States v. Ahmad</i> , 347 F. Supp. 912 (M.D. Pa. 1972)	12
<i>United States v. Bryan</i> , 339 U.S. 323 (1950)	8
<i>United States v. Bukowski</i> , 435 F.2d 1094 (7th Cir. 1970), <i>cert. denied</i> , 401 U.S. 911 (1971)	7
<i>United States v. Cohen</i> , 489 F.2d 945 (2d Cir. 1973)	10
<i>United States v. Culotta</i> , 413 F.2d 1343 (2d Cir. 1969)	9
<i>United States v. Falley</i> , 489 F.2d 33 (2d Cir. 1973)	9
<i>United States v. Fernandez</i> , Dkt. No. 74-1164 (2d Cir. November 6, 1974)	10
<i>United States v. Friedland</i> , 441 F.2d 855 (2d Cir.), <i>cert. denied</i> , 404 U.S. 867 (1971)	13, 14
<i>United States v. Gillette</i> , 420 F.2d 298 (2d Cir. 1970), <i>aff'd</i> , 401 U.S. 437 (1971)	17
<i>United States v. Hammond</i> , 419 F.2d 166 (4th Cir. 1969)	7
<i>United States v. Huss</i> , 482 F.2d 38 (2d Cir. 1973)	4, 6, 9, 10, 12, 13, 14, 16, 17, 18
<i>United States v. Magoddino</i> , 496 F.2d 455 (2d Cir. 1974)	9
<i>United States v. Scale</i> , 461 F.2d 345 (7th Cir. 1972)	7

<i>United States v. Sisca</i> , Dkt. No. 73-2017 (2d Cir. May 10, 1974), slip. op. at 3430-3437, cert. denied, 43 U.S.L.W. 3281 (November 11, 1974)	10
<i>United States v. Tane</i> , 329 F.2d 848 (2d Cir. 1964)	14
<i>United States v. Thompson</i> , 319 F.2d 665 (2d Cir. 1963)	7
<i>United States v. Tijerina</i> , 412 F.2d 661 (10th Cir. 1969)	7
<i>United States v. Tijerina</i> , 446 F.2d 675 (10th Cir. 1971)	17
<i>United States v. Mine Workers of America</i> , 330 U.S. 258 (1947)	7-8
<i>Walker v. City of Birmingham</i> , 388 U.S. 307 (1967)	7

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-2047 and 74-2127

UNITED STATES OF AMERICA,

Appellee,

—v.—

RICHARD HUSS and JEFFREY SMILOW,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Richard Huss and Jeffrey Smilow appeal from judgments of conviction entered on July 31, 1974 in the United States District Court for the Southern District of New York after a trial before the Honorable Thomas P. Griesa, United States District Judge, and a jury.

On June 27, 1973, the Honorable Arnold Bauman, United States District Judge, having previously held the defendants Huss and Smilow in civil contempt of court, directed the United States Attorney for the Southern District of New York to proceed against them on the charge of criminal contempt of court for having knowingly and wilfully refused to obey lawful orders of the court requiring them to testify under grants of immunity at the trial of *United States v. Stuart Cohen and Sheldon Davis* (72 Cr. 778). The criminal contempt proceeding commenced on June 28, 1973, when Judge

Bauman signed orders requiring each of the defendants to show cause, pursuant to Rule 42(b), Fed. R. Crim. P., "why he should not be adjudged in criminal contempt [of court] for his wilful refusal to answer questions put to him at the trial of *United States v. Stuart Cohen and Sheldon Davis*, 72 Cr. 778, . . ."

Trial commenced before Judge Griesa on July 15, 1974, and on July 16, 1974, the jury found the defendants Huss and Smilow guilty. On July 31, 1974, Judge Griesa sentenced each defendant to a one year term of imprisonment. Both defendants are presently free on bail pending the outcome of this appeal.

Statement of Facts

A. The Government's Case

The Government's proof at trial consisted solely of portions of the trial transcript of *United States v. Stuart Cohen and Sheldon Davis* (72 Cr. 778) (hereinafter "the Hurok Case" *).

* On January 26, 1972, firebombs exploded in the New York City offices of Columbia Artists Management, Inc. and Hurok Concerts, Inc., killing Iris Kones, a secretary. On June 19, 1972, Stuart Cohen, Sheldon Davis and Sheldon Seigel were indicted in the Southern District of New York for the firebombing and charged with violations of 18 U.S.C. §§ 844(i) and 2. A superseding indictment, 72 Cr. 778, filed on July 3, 1972, charged the original three defendants and a fourth, Jerome Zellerkraut, with the original two counts and, in addition, with conspiracy (18 U.S.C. § 371) and unlawful possession of explosive devices (26 U.S.C. §§ 5845(a)(8) and (f), 5861(d) and 5871).

On February 2, 1973, three days before the expected commencement of the trial in the district court, the Government moved to sever Sheldon Seigel from the trial on the grounds (i) that he was a Government informer who had provided information leading to the indictments, (ii) that he had testified before the grand jury, and (iii) that he would be called as a Government

[Footnote continued on following page]

The Hurok trial commenced on May 30, 1973, and, on the following day, Sheldon Seigel was called as the Government's first witness. Apart from stating his name and address, Seigel refused to answer any of the questions put to him. Persisting in his refusal even after being ordered to answer by the Court, Seigel was held in civil contempt, pursuant to 28 U.S.C. § 1826(a) and was released on bail. The next witness called by the Government was Richard Huss but before any questions were put to him, Judge Bauman adjourned the trial for one week to enable the Government to determine whether the Central Intelligence Agency had conducted electronic surveillance of persons involved in the case.

On June 8, 1973, the Government denied the existence of such electronic surveillance, agreed to vacate the outstanding order of civil contempt against Seigel, recalled him to the stand, granted him immunity and attempted once again to question him about the Hurok firebombing. In defiance of Judge Bauman's order that he answer, Seigel refused and was again held in civil contempt.*

Richard Huss was then called as the next Government witness at the trial (GX 1A, Tr. 23). In response to questions put to him, Huss stated his name and address but refused to answer further questions on the ground that "my testimony may tend to incriminate me . . . [and] it is my understanding of the Jewish law that I am prohibited from testifying against another Jew in a non-Jewish Tribunal . . ." (GX 1B, Tr. 24). Pursuant to the government's

witness at trial under a grant of immunity. Seigel moved for a protective order preventing the Government from interrogating him based on information obtained from illegal electronic surveillance. Pursuant to 18 U.S.C. § 3504(a)(1), the Government acknowledged the existence of illegal F.B.I. wiretaps involving Seigel. On April 25, 1973, after having conducted a taint hearing to determine the validity of Seigel's claims, Judge Bauman denied Seigel's motion for a protective order.

* The facts of Seigel's refusal to testify, set forth in this and the preceding paragraph, were not put before the jury at the trial of Huss and Smilow.

application, Huss was then granted use immunity pursuant to 18 U.S.C. § 6002 *et seq.* (GX 1B, 1C, Tr. 24-25). Judge Bauman then explained use immunity to Huss and also advised him that his claimed religious privilege did not constitute a legally justifiable ground upon which he could refuse to answer questions (GX 1C, Tr. 25-26). Despite Judge Bauman's admonition and specific orders to answer the questions put to him, Huss persisted in his refusal to answer and was held in civil contempt and remanded (GX 10, Tr. 26-31).

The Government then called Jeffrey Smilow * to the stand. Apart from stating that he was 18 years old, Smilow refused to answer any of the questions put to him on the grounds of: (i) religious privilege; (ii) double jeopardy and (iii) unlawful electronic surveillance (GX 2A, Tr. 32-33). Smilow was thereupon granted use immunity pursuant to 18 U.S.C. § 6002 *et seq.*, and Judge Bauman warned him that none of the asserted grounds for his refusal to testify was legally justifiable and ordered him to answer (GX 2A, Tr. 34-36). Smilow nonetheless refused to answer and Judge Bauman held him in civil contempt ** (GX 2A, Tr. 36-41).

On June 26, 1973, this Court affirmed the orders of civil contempt against Huss and Smilow.*** On June 27, 1973, Huss was recalled to the stand (GX 3, Tr. 41). In response to the first question put to him, Huss stated that although he understood the thrust of this Court's decision

* Smilow had earlier been a party to protracted litigation arising from his refusal to answer questions before the Grand Jury regarding the Hurok bombing. *Smilow v. United States*, 465 F.2d 802 (2d Cir.), *vacated*, 409 U.S. 944 (1972), *on remand* 472 F.2d 1193 (2d Cir. 1973).

** Smilow was thereupon remanded.

*** *United States v. Huss*, 482 F.2d 53 (2d Cir. 1973). The order adjudging Seigel in contempt was reversed on other grounds.

of the previous day he still declined to answer any questions on the ground of religious privilege (GX 3, Tr. 41-42). Judge Bauman then warned Huss that he would direct the United States Attorney to commence criminal contempt proceedings against him unless he obeyed the order directing him to testify (GX 3, Tr. 42-43). Huss acknowledged that he understood the admonition but refused to testify as ordered (GX 3, Tr. 43-48). Judge Bauman then told Huss that he would be a defendant in a criminal contempt proceeding and Huss acknowledged that he understood his predicament (GX 3, Tr. 48-50).

The same day Smilow was also recalled to the stand and stated that he still declined to answer any questions put to him and understood the consequences of his decision (GX 4A, Tr. 50-52).

B. The Defense Case

Neither Huss nor Smilow testified before the jury. Huss did, however, testify, outside the presence of the jury,* that during the summer of 1972 certain threats were communicated to him by other members of the Jewish Defense League (Tr. 59-66). Huss stated that he had no recollection of ever having told Mr. Smilow of such threats. Huss also admitted that such threats had no influence whatever on his decision not to testify pursuant to Judge Bauman's orders (Tr. 67-68).**

* Mr. Chevigny, counsel for both defendants, agreed "to have Mr. Huss initially outline his testimony out of the presence of the jury" (Tr. 57).

** Mr. Chevigny's application to permit Huss to recount such testimony before the jury was denied by Judge Griesa (Tr. 67-68). In addition, Mr. Chevigny offered to have Huss testify about the religious privilege upon which he relied in refusing to obey Judge Bauman's orders to testify. Judge Griesa, consistent with an earlier ruling (Tr. 4), again ruled that such testimony was inadmissible (Tr. 69).

ARGUMENT

POINT I

Judge Griesa did not act improperly in precluding an attempt by Huss and Smilow to litigate a wiretap taint defense.

The sole contention raised by Huss and Smilow on this appeal is that Judge Griesa improperly refused to entertain their motion for discovery of any electronic surveillance of Huss, Smilow or their attorneys. Judge Griesa denied the motion, holding that the discovery sought was to lay the ground work for a defense that the refusal by Huss and Smilow to answer was justified by taint arising from illegal electronic interception, a justification Judge Griesa found foreclosed by this Court's holding on the appeal from the judgments of civil contempt, *United States v. Huss, supra*, that Huss and Smilow had "no just cause" in refusing to answer (App. 158, 159-169). For the reasons given by Judge Griesa, and for others set out below, we submit that the District Court properly disposed of the attempt to assert a defense to the criminal contempt proceeding based on illegal electronic surveillance and that the judgment below should be affirmed.

The decision of the District Court was premised on the view that, had Huss and Smilow grounded their refusal to testify on taint arising from illegal electronic surveillance, that contention should have been litigated in connection with the civil contempt proceeding before Judge Bauman on June 8 and in the Court of Appeals. This holding was clearly correct. While Huss and Smilow characterize the District Court's holding as an impermissible application of the doctrines of *res judicata* or collateral estoppel, it plainly stands on a basis uniquely applicable to the law of criminal contempt. "... [A]n order issued by a court with jurisdiction over the subject matter and person must be

obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. United Mine-workers of America*, 330 U.S. 258, 293 (1947); *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922). Violation of a court order is a criminal contempt of the court making the order even if it is later determined that the court was without jurisdiction to make the order, *United States v. United Mine-workers of America*, *supra*,* or if the order was made under a statute later found unconstitutional, *Howat v. Kansas*, *supra*. "It is well settled that the validity of a court order is not generally a defense in a criminal contempt proceeding alleging its disobedience." *United States v. Seale*, 461 F.2d 345, 361 (7th Cir. 1972); *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *United States v. Bukowski*, 435 F.2d 1094, 1108 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); *United States v. Hammond*, 419 F.2d 166, 168 (4th Cir. 1969); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969); *Backo v. Local 281, United States Brotherhood of Carpenters and Joiners of America*, 308 F. Supp. 172, 176-177 (N.D.N.Y. 1969), *aff'd*, 438 F.2d 176 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971); *Leighton v. Paramount Pictures Corp.*, 340 F.2d 859, 861 (2d Cir.), *cert. denied*, 381 U.S. 925 (1965). For their refusal to testify on June 8, Huss and Smilow were summarily proceeded against under 28 U.S.C. § 1826, which expressly provides for expedited appellate review of commitments under 28 U.S.C. § 1826. Huss and Smilow both exercised that right to review, and this Court affirmed

* *United States v. Thompson*, 319 F.2d 665 (2d Cir. 1963) is illuminating in its refusal to apply the *Howat-United Mine-workers* rule in the context of a refusal to obey an extraterritorial grand jury subpoena. This Court dealt there with an assertion of want of power to issue the subpoena, a jurisdictional claim which can under some circumstances permit a contemnor to attack, in a contempt proceeding, the order disobeyed. An attack on this basis is plainly distinguishable from what Huss and Smilow seek to do here.

Judge Bauman's orders of commitment less than three weeks after their entry, holding that Huss and Smilow lacked just cause to disobey the District Court's direction to testify. Huss and Smilow were recalled and, notwithstanding this Court's holding that they lacked just cause, persisted in their refusal to testify. Since Huss and Smilow refused to obey the District Court's direction to testify on grounds rejected both by the District Court and this Court, they cannot, under the authorities cited above, seek to relitigate the validity of the order they disobeyed.*

Moreover, even if the doctrine against testing in criminal contempt proceedings the validity of orders disobeyed were not so firmly settled, it is clear that Huss and Smilow were not entitled to seek discovery to raise grounds for the refusal to testify not asserted in the proceedings before Judge Bauman. *United States v. Bryan*, 339 U.S. 323, 333-335 (1950). Assuming, *arguendo*, that a taint from illegal electronic interception of their conversation might have entitled them to refuse to answer questions, *Gelbard v. United States*, 408 U.S. 41 (1972), that claim was not asserted at the time Huss and Smilow refused to answer questions on June 8. As this Court noted, 482 F.2d at 51-52, Huss refused to answer on religious grounds, and

* A more difficult question, unnecessary for the Court to reach in this case, is whether a *justifiable* refusal to testify might be set up as a defense in a criminal contempt proceeding, since a rule to the contrary might result in the inability of a witness to secure appellate review of a proper refusal without suffering punishment for criminal contempt. What relief from the strict rule announced in *United Mineworkers* such a situation would warrant need not be reached here, for it is plain that the refusal to answer by Huss and Smilow was reviewed by this Court, found unjustifiable, and nevertheless persisted in by Huss and Smilow thereafter. We submit that the preclusion of an attack on the validity of a court order in a proceeding for criminal contempt is as applicable when judicial review is obtained and the order upheld, as here, as it is in a case where judicial review was never sought at all.

Smilow, though referring to possible taint from electronic surveillance, "never moved to suppress, nor ever remotely suggested to the court that a proper claim of taint was before it . . ." After this Court's decision, Huss again refused to testify in the District Court on religious grounds (App. 81-82). Smilow adverted to a claim that Seigel's disclosure of Smilow's identity was tainted by illegal wire-tapping of Seigel (App. 34-35), a claim insufficient to entitle Smilow to refuse to testify, as this Court held explicitly in *Huss*, 482 F.2d at 52, and, in discussing the *Gelbard* rule, implicitly in *Smilow v. United States*, *supra*, 465 F.2d at 805. Smilow's lawyer also said that, because of the illegal wiretaps already disclosed, he wished "a hearing to see whether or not there was any illegal evidence obtained concerning the defendant Smilow . . ." (App. 36-37), a claim insufficient to warrant any kind of hearing, *United States v. Magaddino*, 496 F.2d 455, 459-460 (2d Cir. 1974), *United States v. Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969), particularly since the Government had earlier given Smilow such logs as might have concerned him, and since, as this Court found, 482 F.2d at 52, the source of the questions asked of Smilow were private conversations between Smilow and Seigel which the latter had secretly recorded. In short, the discovery motion denied by Judge Griesa sought information previously furnished Huss and Smilow and was therefore redundant. Moreover, to the extent that it sought information to lay a basis for a claim of taint not previously raised, it is clear that a refusal to testify could only, absent a showing of suppression by the Government not made here,* be sup-

* Moreover, even if it were established that there was electronic surveillance of Huss or Smilow which was not, as it should have been, disclosed on or before they were called as witnesses on June 8, the questions put to them were based on information furnished to the Government by Seigel, a fact sufficient to permit the questions under both the majority and dissenting opinions in *United States v. Falley*, 489 F.2d 33, 40-41, 42-43 (2d Cir. 1973), even if such other interception had occurred.

ported by bases asserted at the time of the refusal, not those that might be established on the basis of discovery long after the event.*

Furthermore, if Judge Griesa had entertained the motion, it is clear that Huss and Smilow would have been entitled to no relief.

As to Smilow, the record is already clear that the only electronic interception of conversations possibly relating to him was the six telephone calls on May 18, 1971, logs of which were furnished by June 8, 1973, prior to Smilow's refusal to testify (App. 10). The record establishes, as this Court found on appeal from the civil contempt convictions, "... that Seigel, not the wiretap, was the source of the Government's information about Smilow." *United States v. Huss, supra*, 482 F.2d at 52.** Similarly,

* The foregoing establishes, we submit, the want of merit to the two arguments on which appellants primarily rely—that this Court's opinion in *United States v. Huss, supra*, is not conclusive on the issues it determined and that the claims which the Court found were not raised before Judge Bauman could be made before Judge Griesa. On the former point, it is sufficient to note that it was hardly open to Judge Griesa to reach legal conclusions in conflict with those arrived at in the same case by this Court. See *United States v. Fernandez*, Dkt. No. 74-1164 (2d Cir., November 6, 1974), slip op. at 284. On the latter point, Huss and Smilow simply ignore the settled law in this Circuit that failure to raise a claim of illegal electronic surveillance in a timely fashion, as here, precludes its assertion later. *United States v. Sisca*, Dkt. No. 73-2017 (2d Cir., May 10, 1974) slip op. at 3430-3437, cert. denied, 43 U.S.L.W. 3281 (November 11, 1974); *United States v. Cohen*, 489 F.2d 945, 952 (2d Cir. 1973).

** Were there any doubt that it was not the wiretap that enabled the Government to learn about Smilow, such a doubt would be laid to rest by the lamentable fact that it was not until Smilow's appeal from the order finding him in contempt of the Grand Jury reached the Supreme Court that the Government realized that it had overheard the conversations involving someone who might have been Smilow.

before Huss refused to testify on June 8, 1973, he had already been advised that he had not been the subject of electronic surveillance. There was no reason to have further discovery on that point, for the Government had already complied fully with 18 U.S.C. § 3504.

Thus, as has been clear ever since the proceedings before Judge Bauman, the only claim of taint from illegal electronic surveillance available to Huss and Smilow is that Seigel, who furnished the information regarding their involvement in the bombings of the Hurok and Columbia Artists Management offices * which underlay the questions put to them on June 8, had been overheard by the illegal wiretaps at the Brooklyn office of the Jewish Defense League and, later, at Seigel's home. Huss and Smilow were not overheard on the wiretap at Seigel's home, nor do they claim that they were ever there or that they spoke to Seigel at his home over the telephone. Thus, they have no standing to assert the illegality of the interceptions at Seigel's home. *Alderman v. United States*, 394 U.S. 165 (1969). Both Huss and Smilow claim to have frequented the offices of the Jewish Defense League in Brooklyn and to have used the telephones there, and the Government has conceded that Smilow may have been involved in six telephone calls illegally monitored by the wiretap at that office. But assuming *arguendo* that Huss and Smilow have standing to assert the illegality of the interception of Seigel's

* While wholly extraneous to the issues before this Court, the repeated assertions in appellants' brief (at pages 3 and 11) that the Government claims that Huss and Smilow were no more than witnesses to the Hurok and Columbia Artists Management bombings warrant some response. The record establishes that Smilow pleaded guilty to a charge of arson (App. 21) which arose from the Columbia Artists Management firebombing, and the prosecutr's questions of Huss on June 8 (see App. 63) establish the Government's position that Huss together with Zellerkraut, took the bomb to the Hurok offices on January 26, 1972, and ignited it.

conversations on the Jewish Defense League office wiretap, either because they were casual users of the telephones at that office on which Seigel was overheard, *but see Alderman v. United States*, *supra*, 394 U.S. at 176, 179 n. 11, or because they were members of the Jewish Defense League, the subject of the illegal surveillance, *but cf. United States v. Ahmad*, 347 F. Supp. 912, 933 (M.D., Pa. 1972), they would still not be entitled to suppress the statements furnished by Seigel to the Government which underlay the questions put to them on June 8.

The facts developed at the hearing arising from Seigel's refusal to testify and set forth in this Court's opinion in *United States v. Huss*, *supra*,* are that in October, 1970, the Federal Bureau of Investigation installed a "domestic security wiretap" on the Brooklyn office of the Jewish Defense League without judicial authorization. This wiretap continued until July 2, 1971. While this wiretap was in operation, telephone conversations to which Seigel was a party were overheard on six occasions. On April 22, 1971, while this wiretap was still in operation, the offices of Amtorg Trading Corporation, the Russian Trade Mission, were bombed. A New York City Police investigation of

* Although appellants do not advert to it, the Court should, of course, take into account the fact that Huss and Smilow were not parties to the proceeding, arising from *Seigel's* refusal to testify, at which these facts were developed. However, while this certainly suggests that Huss and Smilow are not bound by what was determined there, at the very least they are aware of what was determined and, before demanding a new hearing, they should have in some way, as they did not, shown that further proceedings would develop evidence which would controvert the facts already established at the hearing. Given the absence of any such allegations by Huss and Smilow and the fact that their only arguable claim derives entirely from illegal overhearings of Seigel, there is simply no purpose in relitigating what had already been determined, particularly in view of the limited inquiry required in criminal contempt proceedings.

the bombing led to the arrest of Seigel, whose cooperation was then sought in the on-going investigation of the activities of the Jewish Defense League, especially the Amtorg bombing. Sometime after August 9, 1971—after the wiretap at the Brooklyn office of the Jewish Defense League had ended—Seigel agreed to cooperate in the investigation of the Jewish Defense League and admitted his participation in the Amtorg bombing.

On December 15, 1971, without Seigel's knowledge or judicial sanction, the Federal Bureau of Investigation commenced a wiretap on Seigel's home telephone which lasted until March 1, 1972. On January 26, 1972, while Seigel's home telephone was being tapped, the offices of Columbia Artists Management and Hurok Concerts were bombed.

On May 7, 1972, Seigel revealed to law enforcement authorities that he and others had participated in the Hurok and Columbia Artists Management offices on January 26, 1972. His disclosures at that time and thereafter concededly provided the basis for the questions put to Huss and Smilow on June 8, 1973.

On these facts, assuming that Seigel's identification by and cooperation with law enforcement officials arose from the illegal wiretap of the Jewish Defense League office in Brooklyn—a claim which this Court in *United States v. Huss, supra*, foreclosed the Government from litigating because of the destruction of the tape recordings of the wiretap, and assuming that Huss and Smilow have standing to assert this illegality, the fact remains that the discovery through Seigel of the participation of Huss and Smilow in the Hurok and Columbia Artists Management bombings was sufficiently attenuated from that wiretap to foreclose its suppression. *United States v. Friedland*, 441 F.2d 855, 856-861 (2d Cir.), *cert. denied*, 404 U.S. 867 (1971). The wiretap on the Jewish Defense League office in Brooklyn ended on July 2, 1971, nearly six months

before the bombings at the Hurok and Columbia Artists Management offices on January 26, 1972, and more than ten months before Seigel revealed Huss and Smilow's participation in those bombings. These circumstances, we submit, put this case directly within the category discussed by Judge Friendly in distinguishing *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964):

"... an illegal wiretap would not confer immunity merely because it had intensified an existing investigation which might otherwise have been discontinued or, *a fortiori*, because it possessed a remote causal relation to the beginning of a new one that would lead to detection of an unrelated crime that had not yet even been planned." *United States v. Friedland*, *supra*, 441 F.2d at 860.

Indeed, the attenuation of the taint is greater in this case than required by *Friedland* because here there can be no doubt that the January 26 bombings would have been the subject of intensive investigation even without the assistance of Seigel, which was grudging, to say the least. Moreover, the interceptions which gave rise to the discovery of Seigel were not of conversations to which either Huss or Smilow were parties, while in *Friedland* the Court posited that those investigating Friedland were aware of the contents of the interception of Friedland's own conversations. Similarly, in *United States v. Tane*, *supra*, the defendant was a party to the conversation at which the identity of the crucial witness was disclosed; moreover, the subject matter of that conversation was the illegal payments which later formed the basis for the prosecution, while here the crime underlying the questions did not occur until six months after the interceptions had ceased. Finally, the manner in which Seigel was identified and his cooperation secured was fully before this Court in *United States v. Huss*, *supra*, and it is inconceivable that the Court would have held the refusals of Huss and Smilow to testify un-

justifiable if they were entitled to assert a taint claim arising from the illegal interception of Seigel's conversations.

Finally, even if Huss and Smilow were entitled to suppress all information furnished by Seigel because the latter was discovered by means of an illegal wiretap, the fact remains that none of the information furnished by Seigel was offered as evidence against them at the trial below. See *In re Dellinger*, 357 F. Supp. 949, 959 (N.D. Ill. 1973) (Gignoux, J.), *aff'd*, 502 F.2d 813, 818-819 (7th Cir. 1974). And while, to be sure, the prosecutor's questions were concededly based on the information Seigel had furnished, his questions served no evidentiary purpose at the trial below except insofar as they were shown to have been asked, hardly a basis for finding reversible error in their admission even if the information underlying them was subject to suppression. Huss and Smilow could have been convicted below had the contents of the questions they were asked never been put before the jury, for it would have been sufficient to call the stenographer and inquire whether the appellants had been asked questions which they had refused to answer despite orders from Judge Bauman that they do so.

POINT II

Judge Griesa properly excluded testimony proffered by the defendants concerning their religious beliefs and properly instructed the jury regarding such views.

Defendants—relying on cases having nothing whatever to do with the uniquely narrow issue of intent projected by the charges of criminal contempt in this case—argue that their convictions must be reversed because Judge Griesa erroneously precluded them from testifying about their religious beliefs, which was one of the asserted bases upon which both Huss and Smilow refused to obey Judge

Bauman's orders directing them to testify. The claim is utterly without merit.

In affirming the orders of civil contempt against Huss and Smilow in *United States v. Huss*, *supra*, 482 F.2d at 51-52, this Court determined as a matter of law that the defendants had no legally justifiable ground upon which to defy Judge Bauman's lawful orders directing them to testify. In its decision, this Court, consistent with its earlier decision in *Smilow v. United States*, *supra*, flatly rejected the claim of religious privilege advanced by Huss and Smilow in the appeal from the orders of civil contempt and on the basis of which they sought to persuade the jury that their defiance of Judge Bauman's orders was justifiable. Thus, the issue of intent projected by the instant criminal contempt charge was no broader than the two-pronged inquiry: (i) did each of the defendants understand the nature of Judge Bauman's orders directing him to testify and the consequences of any failure to obey; and (ii) with full understanding of such orders and the consequences of any lack of obedience, did each defendant nonetheless deliberately defy such orders. The Government's proof at trial, consisting solely of portions of the transcript of proceedings at which Huss and Smilow defied Judge Bauman's orders, was more than sufficient to establish each of the foregoing elements beyond a reasonable doubt.

Huss and Smilow now argue, however, that although their religious beliefs might not "give them a total defense or, indeed, any defense at all" (Br. at 35) each should have been allowed to explain to the jury "what was in his mind when he committed the allegedly unlawful act" (Brief at 35). In support of their position, defendants mistakenly rely on a number of criminal cases having nothing whatever to do with the issue of intent raised by the charge of

criminal contempt.* Testimony by Huss and Smilow as to their motive in disobeying Judge Bauman's order would not have been relevant to their intent and was therefore properly excluded. *United States v. Gillette*, 420 F.2d 298, 300 (2d Cir. 1970), *aff'd*, 401 U.S. 437 (1971).

* *Collazo v. United States*, 196 F.2d 573 (D.C. Cir. 1952), *cert. denied*, 343 U.S. 968 (1952) involved an appeal from a conviction of first degree murder and assault with intent to kill in which the court, in affirming the conviction, stated that Collazo "was properly allowed to testify as to his own intent" where the questions for the jury's resolution were whether the killing by Collazo's deceased co-defendant was within the design a plan of the defendants and whether the killing was a natural and probable result of the acts which Collazo and his co-defendant concerted to perform. Testimony by Collazo concerning his views on conditions in Puerto Rico was held irrelevant and properly excluded, even though these views no doubt influenced his criminal conduct.

United States v. Tijerina, 446 F.2d 675 (10th Cir. 1971) involved an appeal from a conviction of offenses charged in connection with a demonstration at which two United States Forest Service signs were burned. In affirming the conviction the Court decided that although Tijerina's explanation of his specific intent had been admitted, the trial judge properly excluded irrelevant testimony concerning Tijerina's personal views about a certain land grant. Hence, we suggest that there is nothing inconsistent between the Tenth Circuit's decision and that of Judge Griesa to exclude irrelevant and immaterial testimony concerning the defendant's personal religious beliefs which had no bearing on whether the defendants understood the court's orders which they refused to obey.

In *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1968), Leary was permitted to adduce testimony of the type appellants sought to offer here, apparently without objection. The Court of Appeals later held the testimony "not pertinent" and that an instruction based on it was properly refused. 383 F.2d at 859-860. Of course, as this Court determined in *Smilow v. United States*, *supra*, and *United States v. Huss*, *supra*, the defendants' personal religious beliefs are irrelevant and immaterial to the resolution of the only fact issue at the core of this case.

Huss and Smilow also claim that certain of Judge Bauman's remarks should have been excised from the portion of the trial transcripts presented to the jury (Br. at 35-39). No objection was taken on this ground below.* Moreover, the portions of the transcript containing Judge Bauman's remarks were properly admitted in evidence inasmuch as Judge Bauman's remarks to Huss and Smilow constituted the Government's direct proof that both defendants were repeatedly warned of their predicament by Judge Bauman prior to the time when he directed the United States Attorney's Office to commence these proceedings. The evidence shows that not only did Judge Bauman acquaint them in the strongest and clearest language with his views of their conduct and its consequence but also that both Huss and Smilow, following Judge Bauman's admonitions, acknowledged that they understood the certain consequences of their defiance of Judge Bauman's orders. Thus, Judge Bauman's comments, though certainly damaging, were relevant and material to the core issue in the case, namely, whether the defendants, with full understanding both of the Court's orders directing them to testify and of the consequences of their defiance, nonetheless deliberately refused to obey such orders.

Finally, Huss and Smilow urge that Judge Griesa erroneously instructed the jury that the "religious objection is not a valid defense here nor was it valid ground for refusing to testify in the proceedings before Judge Bauman." This Court's decisions in *Smilow v. United States*, *supra*, and *United States v. Huss*, *supra*, clearly establish the correctness of the instruction.

* Appellants' citation to App. 174 as establishing the futility of such an objection proves the contrary of their assertion.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ROBERT GOLD,
JOHN D. GORDAN, III,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)
County of New York)

ROBERT GOLD

being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the *20th* day of *November* *1974*
he served a copy of the within *brief*
by placing the same in a properly postpaid franked
envelope addressed:

Paul Chevigny, Esq.
New York Civil Liberties Union
84 Fifth Ave.
New York, New York 10011

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing *outside* the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Robert J. Gold

Sworn to before me this

day of *November*, *1974*

JEANETTE ANN GRAYES
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

AFFIDAVIT OF MAILING

State of New York)
County of New York)

ROBERT GOLD being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the *20th* day of *November* *1974*
he served a copy of the within *brief*
by placing the same in a properly postpaid franked
envelope addressed:

*Nathan Lewin, Esq.
Room 210
Faculty Office Bldg.
Harvard Law School
Cambridge, Mass. 02138*

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing *outside* the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Robert J. Gold

Sworn to before me this

20 day of *NOVEMBER, 1974*

JEANETTE ANN GRAYB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975